Supreme Court, U.S.
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No. 03 723 NOV 13 2003

In The
Supreme Court of the United States

SCHWEGMANN GIANT SUPER MARKETS, INC.; SCHWEGMANN GIANT SUPER MARKETS PENSION PLAN; JOHN F. SCHWEGMANN; G.G. SCHWEGMANN CO.; JOHN SCHWEGMANN, JR. TRUST ESTATE,

Petitioners,

versus

JOHN MUSMECI; CARROL BOUDREAUX; WILLIE BLANCHARD; MELVIN CAMET, SR.; JOSEPH DECUIR; MAURICE MIRANDA; JACQUELINE S. PALAMA; VICTOR SCHAMBRA; BRUCE SOLOMONS; JOSEPH T. SPITELERA; AUDREY TOAL; On their own behalf and on behalf of all similarly situated employees; YVONNE WHITE; CYNTHIA NORMAND; CHARLES CARROL DIONNE; JOSEPH O'NEIL DIONNE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does ERISA apply to in-kind, unfunded, purely voluntary, gratuitous, and informal employer-granted grocery subsidies to a retiree, whose right to those subsidies does not arise until after he retires, i.e., after his employment relationship with the employer ceases?
2. Does ERISA apply, at all, to such in-kind, non-cash, unilateral contributions, irrespective of any attendant circumstances?
3. Assuming, *arguendo*, ERISA application, is any of the defendants liable to plaintiffs for maladministration under 29 U.S.C. § 1132(a)(1)(B)?
4. Assuming ERISA application, is any of the defendants liable to plaintiffs for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3)?
5. Is defendant, John F. Schwegmann, who, at all times pertinent, acted in his official/representative/corporate capacities on behalf of the various entities herein involved, personally liable for breach of fiduciary duty, *supra*?
6. Assuming, arguendo, liability, are plaintiffs entitled to extra-contractual monetary (compensatory) damages under either 29 U.S.C. § 1132(a)(1)(B) or 29 U.S.C. § 1132(a)(3)?
7. Assuming liability, did any plaintiff satisfy ERISA's requisite vesting requirements?
8. Does ERISA authorize relief against parties other than the Pension Plan?

CORPORATE DISCLOSURE

Petitioners are Schwegmann Giant Supermarkets, Inc.; Schwegmann Giant Supermarkets Pension Plan; John F. Schwegmann; G.G. Schwegmann Co.; and John Schwegmann Jr. Trust Estate.

There are no parent corporations or publicly held companies owning 10% of any of the corporate petitioners' stock. Schwegmann Giant Supermarkets, Inc. and G.G. Schwegmann Co. are privately held Louisiana corporations.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	7
SUMMARY OF ARGUMENT	16
LAW AND ARGUMENT	17
I. THE DISTRICT COURT'S AND THE FIFTH CIRCUIT'S ERROR	17
II. THE DISTRICT COURT'S CATCH-22 REASONING ON JOHN SCHWEGMANN	17
III. JOHN SCHWEGMANN CANNOT BE INDIVIDUALLY LIABLE	21
IV. LOCKHEED CORPORATION, ET AL. V. SPINK	23
V. THE DISTRICT COURT'S INCONSISTENCY.	26
VI. MONEY DAMAGES ARE NOT AVAILABLE TO PLAINTIFFS	27
VII. ASSUMING ERISA APPLICATION, NONE OF THE PLAINTIFFS WAS VESTED	28
VIII. CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Allied Trade Unions v. Kracher, 856 F.2d 1546 (D.C. Cir. 1988) 23

Confer v. Custom Engineering Co., 952 F.2d 34 (3rd Cir. 1991) 19

Curtis-Wright Corporation v. Schoonenjongen, 514 U.S. 72, 115 S.Ct. 1223, 131 L.Ed. 2d 94 (1995) 28

Great-West Life and Annuity Ins. Co. v. Knudson, 534 U.S. ___, 70 U.S.L.W. 4056 (January 8, 2002) 27

Howe v. Variety Corp., 896 F.2d 1107 (8th Cir. 1990) 28, 29, 30

Howe v. Variety Corp., 36 F.3d 746 (8th Cir. 1994) 28, 29

Hozier v. Midwest Easterners, Inc., 908 F.2d 1155 (3rd Cir. 1990) 19, 20, 27

Hughes v. 3M Retiree Medical Plan, 134 F. Supp. 2d 1062 (D. Minn. 2001) 29, 30

Izzarelli v. Rexene Products Co., 24 F.3d 1506 (5th Cir. 1994) 19, 27

Lockheed Corp., et al. v. Spink, 517 U.S. 882 (1996) 25, 26

Massachusetts v. Morash, 490 U.S. 107, 109 S.Ct. 1668 29

Mohalley v. Kendall Health Care Products, Inc., 903 F. Supp. 1530 (M.D. Ga. 1995) 28

Rockney v. Blohorn, 877 F.2d 637 (8th Cir. 1989) 22, 23, 25, 26

TABLE OF AUTHORITIES – Continued

Page

Variety Corp. v. Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed. 2d 130 (1996) 28

Wayman by Matthews v. Colonial Penn. Life Insurance Co., 805 F. Supp. 525 (E.D. Tenn. 1992) 28

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1961(a) 5

29 U.S.C. § 1001, *et seq.* 1

29 U.S.C. § 1002 18

29 U.S.C. § 1002(1) 1, 29

29 U.S.C. § 1002(2)(A) 1, 29

29 U.S.C. § 1002(21)(a) 1, 18, 19

29 U.S.C. § 1022 24

29 U.S.C. § 1022(2)(A) 1

29 U.S.C. § 1104 ..... 1, 23

29 U.S.C. § 1106(a)(1)(D) 1, 26

29 U.S.C. § 1132(a)(1)(B) ..... *passim*

29 U.S.C. § 1132(a)(3) 17, 27

29 U.S.C. § 1132(a)(3)(B) 1, 4

Section 404, ERISA 26

Section 406, ERISA 25

Section 406(a)(1), ERISA 25

Section 409, ERISA 25

TABLE OF AUTHORITIES – Continued

Page

Section 502(a)(1)(B), ERISA 7, 16

Section 502(a)(3), ERISA 7, 16

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on June 11, 2003 and revised June 13, 2003 and is reprinted in the Appendix at App. 1 to App. 32. The Findings of Fact and Conclusions of Law of the United States District Court for the Eastern District of Louisiana were filed on August 23, 2001.

JURISDICTION

The denial of the rehearing from the United States Court of Appeals for the Fifth Circuit was on August 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statute in question is the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* The specific sections of ERISA discussed herein include: [1] 29 U.S.C. § 1002(1), 1002(2)(A), and 1002(21)(a); [2] 29 U.S.C. § 1022(2)(A); [3] 29 U.S.C. § 1104; [4] 29 U.S.C. § 1106(a)(1)(D); and [5] 29 U.S.C. § 1132(a)(1)(B) and 1132(a)(3)(B).

STATEMENT OF THE CASE

In September, 1997, plaintiffs filed this class action suit in the U.S. District Court – Eastern District of Louisiana under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and, alternatively, under state law, alleging that the retirement grocery vouchers[1] amount to pension benefits under ERISA.

[1] Only one of the plaintiffs received cash payments in lieu of vouchers.

Defendants are identified as follows: (1) John F. Schwegmann, (a) [as] vice-president and chief executive officer of Schwegmann Giant Supermarkets, Inc. ("SGSM, Inc."), (b) as chief executive officer of Schwegmann Giant Supermarkets (SGSM), the partnership that includes SGSM, Inc., (c) as president of G.G. Schwegmann Co., Inc., and (d) as a trustee of John Schwegmann, Jr. Trust Estate[2]; (2) SGSM, "a partnership . . . whose partners are . . . SGSM, Inc., G.G. Schwegmann Co., and John Schwegmann, Jr. Trust Estate"[3] as the "employer of all of the plaintiffs and the sponsor of the Pension Plan"[4]; (3) SGSM, Inc. as "managing partner of the [SGSM] partnership"[5]; (4) G.G. Schwegmann Co., a "Louisiana corporation authorized to do and doing business in Louisiana," as a partner in SGSM[6]; (5) Schwegmann Giant Supermarkets Pension Plan[7]; and (6) John F. Schwegmann Trust Estate, as a partner in SGSM.[8] Plaintiffs further describe John F. Schwegmann ("Schwegmann") ". . . [a]s chief executive officer [of SGSM, Inc.], [who] had ultimate responsibility for all employees employed by the partnership . . . and a fiduciary of the Pension Plan."[9] Schwegmann was not sued in his individual capacity.

Defendants herein, while maintaining their position against ERISA application, filed a cross-claim for

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[2] Article 6, Complaint, R. 277, *et seq.* and Article 6, Amended Complaint, R. 264, *et seq.*

[3] Article 4, Amended Complaint, *supra.*

[4] Article 8, Amended Complaint, *supra.*

[5] Article 4(a), Amended Complaint, *supra.*

[6] *Id.*

[7] Article 5, Amended Complaint, *supra.*

[8] *Id.*

[9] Article VI(A), page 5, Pre-Trial Order, R. 3277, *et seq.*

contribution against USF&G,[10] which provided an Excess Employee Benefits Liability Policy to all defendants on the ERISA cause of action.

The case was tried on July 30-31, 2002. The district court, at the close of plaintiffs' case, dismissed plaintiffs' state law claims,[11] and took under advisement the ERISA claim.[12]

On August 23, 2001, the district court entered its Findings of Fact and Conclusions of Law.[13] The court concluded that ERISA applies, and that "plaintiffs may recover the benefits they are owed directly from the Schwegmann partnership."[14] The court further concluded that "Mr. Schwegmann faces no personal liability under 29 U.S.C. § 1132(a)(1)(B), absent some basis for piercing the corporate veil, solely by virtue of his status as an officer, board member, or shareholder of SGSM, Inc."[15] The court assessed liability under Section 1132(a)(1)(B) against SGSM, Inc., G.G. Schwegmann Company, and the John Schwegmann, Jr. Trust Estate, "as the constituent partners of the Schwegmann partnership . . . for their virile shares of any liability faced by the Schwegmann partnership."[16]

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[10] R. 65, *et seq.*

[11] Tr., p. 346, R. Vol. 20.

[12] Tr., pp. 420-1, R. Vol. 20.

[13] See R. Excerpts, Tab 6. The court's Findings and Conclusions appear in 159 F. Supp. 2d 329, *Musmeci v. Schwegmann Giant Supermarkets.*

[14] *Id.*, p. 54 of Findings and Conclusions. SGSM, the partnership, was not represented at trial; and it is not represented in this appeal.

[15] *Id.*, note 23 (of Findings and Conclusions).

[16] Page 54, Findings and Conclusions. John Schwegmann was not an SGSM partner.

The court then concluded that "Mr. Schwegmann and the Schwegmann partnership are . . . plan fiduciaries."[17] The court added that ". . . Mr. Schwegmann likely exercised [fiduciary] control and authority while acting in his official capacity as a corporate officer of SGSM, Inc."; but that Schwegmann, "while nevertheless acting on behalf of a corporate entity, faces *potential* (emphasis added) fiduciary liability in [his] individual capacity with no necessity of piercing the corporate veil."[18] The court, still unclear on the issue of Schwegmann's personal liability, opined: "Given that Mr. Schwegmann and the partnership did not fund the Plan, and terminated it without providing for protection of the plaintiffs' vested rights, they breached their duties as ERISA fiduciaries."[19]

The court laid the foundation for granting a money judgment in plaintiffs' favor under Section 1132(a)(1)(B): "Because the court has concluded that plaintiffs have a remedy to recover benefits under Section 1132(a)(3)(B), equitable relief under Section 1132(a)(3)(B) is not necessary to redress plaintiffs' injuries."[20] The court hastened to add: "If relief were otherwise unavailable, the court would award plaintiffs restitutionary damages . . . [under] Section 1132(a)(3)(B)."[21]

Although the plaintiffs had always treated the Plan as a defendant, the court, strangely, afforded the Plan plaintiff status: "Thus, while participants, such as plaintiffs in this case, have standing to sue the fiduciary for the losses

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[17] Page 56, Findings and Conclusions.

[18] Page 57, Findings and Conclusions.

[19] Page 60, Findings and Conclusions.

[20] Page 63, Findings and Conclusions.

[21] *Id.*, Note 26 (of Findings and Conclusions).

caused by his breach, they can do so only in a representative capacity on behalf of the Plan."[22]

The court found that the Excess Liability Policy provided by USF&G "to the various Schwegmann entities" covered the acts sued upon: "[T]he Court concludes that the entire cross-claim asserted by Schwegmann against USF&G constitutes a single claim and a single, self-insured retention limit of $250,000.00 applies."[23]

On January 22, 2002, the court reduced its Findings and Conclusions to a Final Judgment in favor of plaintiffs "for benefits in the amount of $5,127,587.36 with pre-judgment interest at a rate of 9.25% on past due amounts dating from March 1, 1997, in the amount of "$267,032.17 [with] post-judgment interest [accruing] pursuant to 28 U.S.C. § 1961(a)." Judgment was entered *in solido* against all defendants, including the Plan, which the court had earlier identified as a plaintiff[24] and USF&G for "up to $5,131,599.56 and for 95.124% of any interest that accrues after the date of this judgment and 95.124% of any attorney fees awarded."[25]

On January 22, 2002, the court issued a Minute Entry addressing (1) the unresolved issue of Schwegmann's personal liability, (2) the question of whether USF&G "can be held liable for more than $5,000,000.00," and (3) "whether USF&G is liable for attorneys' fees."[26]

The court explained its findings on Schwegmann's personal liability: "The Court's Findings of Fact and

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[22] Page 61, Findings and Conclusions.

[23] Page 74, Findings and Conclusions.

[24] Note 22, *supra*.

[25] Final judgment, R. Excerpts, Tab 3.

[26] Minute Entry, R. Excerpts, Tab 3.

Conclusions of Law make clear that Mr. Schwegmann is *not* (emphasis added) personally liable as a plan administrator . . . However, the Court expressly found that [he] was an ERISA fiduciary and that he and the partnership breached their duties as fiduciaries to the . . . Plan."[27]

The court further explained that "USF&G is liable for the full amount of benefit damages minus the $250,000.00 self-insured retention, plus 95.124% of pre- and post-judgment interest and of any attorney fees awarded."[28]

The court rendered an Amended Final Judgment, entered on January 25, 2002. There the court supplemented the Final Judgment by expressly rendering judgment "against United States Fidelity and Guaranty Company . . . in favor of [all other defendants] on their cross-claim [for contribution] under the Excess Liability Policy, for the judgment up to the amount of $5,131,599.56 . . . and "for 95.124% of any interest that accrues after the date of this judgment and 95.124% of any attorney fees and costs awarded."[29]

On February 7, 2002, the court, via Minute Entry, denied USF&G's Motion to Alter Judgment and Amend Findings.[30] USF&G had asked the court to conclude: "(1) that plaintiffs (other than Spitelara)[31] have no right to

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[27] Page 3, Minute Entry, *supra*. Ostensibly, this statement indicates the court's intention to find Mr. Schwegmann personally liable as to his status as a fiduciary.

[28] Pages 5-6, Minute Entry, *supra*.

[29] Amended Final Judgment, R. Excerpts, Tab 4.

[30] Minute Entry dated February 7, 2002, R. Excerpts, Tab 5.

[31] Spitelara is the only plaintiff who received cash rather than vouchers, although, like all other plaintiffs, his right to the subject benefits did not accrue until *after* he retired, i.e., was no longer employed by Schwegmann.

money damages under Section 502(a)(1)(B) in lieu of the non-cash benefits provided under the terms of the grocery voucher plan; (2) that a monetary award is not a permissible form of equitable relief under Section 502(a)(3) because fiduciary liability under ERISA is expressly excluded from coverage."

On February 19, 2002, USF&G appealed all aspects of the court's Final and Amended Judgments.[32]

On February 25, 2002, defendants – SGSM, Inc., G.G. Schwegmann Co., the John Schwegmann, Jr. Trust Estate, Schwegmann Giant Supermarkets Pension Plan, and John F. Schwegmann appealed, among other rulings, the Final and Amended Judgments imposing *in solido* liability on them under ERISA.[33]

The Fifth Circuit U.S. Court of Appeals affirmed the district court's judgments on June 11, 2003. Defendants filed a petition for rehearing, which was denied on August 15, 2003.

STATEMENT OF FACTS

In 1984, SGSM began the distribution of food vouchers to various former employees. **One's right to receive the vouchers did not materialize until he retired, i.e., when his employment by SGSM ceased.** The vouchers were essentially coupons redeemable only at Schwegmann stores for one month from their date of issue.

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[32] USF&G's Notice of Appeal, R. Excerpts, Tab 2.

[33] Defendants' Notice of Appeal, R. Excerpts, Tab 2. John Schwegmann and the Schwegmann-entity defendants are appellants only with regard to the various ERISA issues and the question of John Schwegmann's personal liability as an ERISA fiduciary.

The voucher program was conceived by John Schwegmann in his official capacity as chief executive officer of SGSM, Inc., SGSM's controlling partner.[34] The origin and essence of the program are best illustrated by the testimony of Sam Levy, director of operations and president of SGSM, Inc.:

> We [Schwegmann and Levy] went to a retirement luncheon for Ms. America Nieves, . . . a longtime employee . . . [and] supervisor . . . Mr. Schwegmann, on our way back home, mentioned that it was sad . . . that employees that have been so loyal for the company and have reached retirement age that he wanted to make sure that if we could put something together that would at least have food on their table as long as we were in the grocery business, and we can afford it for us to do so for those employees.
>
> And he instructed me to think about it and figure out what it would take to – for a . . . husband and wife to have enough food on their table for survival, and I did so . . .
>
> I came back to him with an idea and an amount, and he instructed me to . . . put it in place.
>
> We put together a voucher . . . in a monthly amount of $212 for them to redeem at the [Schwegmann] store of their choice for groceries.[35]

Mr. Schwegmann testified along the same lines:

> It occurred to us that when we created the 401(k) profit-sharing plan that there . . . was a number of *living retirees* (emphasis added) that did not

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[34] Stipulated Facts, Pre-Trial Order, R. 3277, *et seq*. Notes 50 and 53, *infra,* district court's Findings and Conclusions.

[35] Tr., pp. 347-348, R. Vol. 20.

> have the benefit of having participated in the 401(k) profit-sharing plan . . .
>
> And a lot of those people . . . rely greatly on their survival on social security . . . The thought saddened me that . . . they would be wanting for food . . .
>
> So we established this much like . . . the federal food stamp program and came up with a monetary amount . . . and [the vouchers] were redeemable at any Schwegmann store for food.[36]

SGSM offered to its employees a 401(k) ERISA pension plan, health benefits, and life insurance benefits. All of these benefits were evidenced by formal, written documentation. The 401(k) plan was, quite clearly, an ERISA plan, wholly distinguishable from the voucher plan.[37] Mr. Schwegmann testified as to the striking differences between the 401(k) plan and the voucher arrangement:

> Q. What was the motive . . . behind your decision to provide 401(k) benefits?
>
> A. It was a combination of wanting to provide . . . a plan **for employees** (emphasis added) . . . that would benefit them upon retirement and at the same time reward the Schwegmann company.
>
> Q. In what way?
>
> A. **. . . The idea of the 401(k) is a sharing, a participation on the part of the employee as well as the company to put money aside for one's retirement.** This plan was advertised, it was promoted, it was encouraged that *employees* would participate. It was a tool to attract and keep

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[36] Tr., pp. 278-279, R. Vol. 19.

[37] SGSM 401(k) plan, R. 473-488, Exh. 12.

quality employees in the Schwegmann company . . . (emphasis added).

Q. Was there any such motive in connection with the vouchers?

A. No, sir . . . it was totally gratuitous without any thought of reward coming to the Schwegmann company.

Q. . . . [H]ow were the vouchers funded?

A. . . . [T]hey were *within a certain time period* (emphasis added) they were allowed to be substituted for food products in any Schwegmann store.

Q. Did you allow the voucher holders to otherwise spend the vouchers . . . ?

A. They were . . . redeemable only at Schwegmann's.

Q. Did the vouchers involve any cash payments whatsoever?

A. . . . It would have been ridiculous the thought that somebody could purchase a pack of chewing gum and get . . . fifty plus dollars in change.[38]

Schwegmann made additional material distinctions in later testimony:

Q. On the 401(k) Plan you had an administrator who administered those funds, correct?

A. That's correct.

Q. There was no such administrator to administer funds on the food voucher program, correct?

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[38] Tr., pp. 282-284, R. Vol. 19.

A. **The funds . . . were the articles on the shelves in the Schwegmann supermarkets . . . It was nothing more sophisticated than that.** (Emphasis added).

Q. There were no separate funds for an administrator to administer on the food vouchers, right?

A. That's correct.[39]

Mr. Levy further contrasted the voucher scenario with the 401(k) plan:

A. The 401(k) was funded with different funds put aside by law, we went by the guidelines . . . And we set up trustees and everyone had to qualify for that plan under the government guidelines and documents were signed . . .

Q. Did . . . employees have to sign off . . . on the 401(k)?

A. . . . [Y]es. They had to sign on because they also had to give who their beneficiaries would be . . .

Q. Did they have to sign off on anything with regard to the vouchers?

A. Oh, no . . .

Q. . . . [W]hy the difference?

A. Well, because the 401 was a kind of retirement plan while the voucher was kind of something that we wanted to do as a gift to the employees . . .

Q. Did you give any instructions to store managers about how vouchers should be redeemed?

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[39] Tr., p. 296, R. Vol. 19.

A. Yes . . . it was to be redeemed at the register for grocery only.

Q. Where did you get the money to fund the vouchers?

A. . . . [W]e never got any money . . . they were from the general funds, the grocery inventory.

Q. Why did Schwegmann discontinue vouchers after the stores were sold?

A. Because we had no groceries.[40]

Roland Tedesco, SGSM's internal auditor until 1987, was intimately familiar with the voucher program; he in fact designed the voucher certificate.[41] His testimony about the essence of the vouchers is most revealing:

Q. What exactly was your understanding as to who got vouchers?

A. Well, the vouchers were intended as a gratuity for the retirees who were retiring after 20 years of service . . . the vouchers were for use of grocery only, no cash . . .

Q. . . . Are you aware that people actually got change for vouchers?

A. . . . [T]his was reported to Mr. Levy and Mr. Levy reprimanded this retiree that he could not do that.

Q. Were you familiar with the Schwegmann 401(k) retirement plan?

A. Yes . . . I was party to that . . . These funds for the 401(k) plan were naturally my funds and Mr. Schwegmann's funds which were immediately taken out of the general fund

[40] Tr., pp. 348-352, R. Vol. 20.

[41] Tr., p. 252, R. Vol. 19.

> and sent to the Hibernia Bank for their handling and investments and so forth. So therefore the funds left the store immediately . . . This is completely different than grocery vouchers . . . And I was astute enough to know that if there was no grocery . . . store to cash the grocery vouchers they would be discontinued.
>
> Q. Did you ask anyone in Schwegmann management what might happen to the vouchers if Schwegmann were no longer in the grocery business?
>
> A. I was astute enough to know that the grocery vouchers were paid out of general funds. If there was no grocery business to cash a grocery voucher I didn't think that I would get any more grocery vouchers. **Different than a 401(k) plan. 401(k) plan was part my money which was sent to the Hibernia Bank and part of Mr. Schwegmann's money, which was sent to the Hibernia Bank. So those left the general fund. But the money for grocery vouchers never did.**[42] (Emphasis added).

Other than the voucher forms, the only writing related to the voucher program is a succinct memo dated July 2, 1985. The memo was drafted by Joseph Warnke, an SGSM executive.[43] It indicates that food vouchers may be issued to *a retiree* who (1) has at least 20 years of service,

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[42] Tr., pp. 252-255, 262-263, R. Vol. 19.

[43] Stipulated Facts, Pre-Trial Order, R. 3277, *et seq*. The memo is in evidence.

(2) retired at or subsequent to reaching age 60, and (3) was a supervisor for at least one year.

The above testimony, largely unchallenged, along with the numerous stipulations of fact in the record and the documentary evidence admitted at trial leave us with the following inescapable factual conclusions:

1. There was no formal written plan for the food voucher program.
2. There was no separate fund for the program.
3. The vouchers were non-cash, in-kind, non-transferable benefits advanced from store inventory, and they were never identified as an employment benefit, unlike the Schwegmann 401(k) plan formulated pursuant to the requirements of ERISA.
4. The right to food vouchers did not accrue until *after an employee retired.*
5. The vouchers, in essence, subsidized the purchase of Schwegmann groceries by Schwegmann retirees; they did not amount to compensation for service.
6. The vouchers were a fringe benefit offered to certain Schwegmann retirees who satisfied the criteria listed in the Warnke memo; they did not survive the death of the voucher recipient, and they were non-transferable.[44]
7. The individual voucher was ephemeral. It had to be redeemed within 30 days of its issue. An unredeemed voucher over 30 days old was worthless.

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[44] Tr., p. 26, R. Vol. 19.

8. The entire cost of the vouchers was borne by SGSM. The voucher recipients contributed nothing to the program.

On February 14, 1997, SGSM was sold, and it no longer owned any grocery stores or grocery inventory. The sale was the result of fortuitous market conditions, and the record is clear that there was no mismanagement by anyone associated with SGSM. While the sale was pending, John Schwegmann, as chief executive officer of SGSM, Inc., sent a letter, dated February 7, 1997, to all retirees stating that the stores would be sold and that food vouchers could, therefore, no longer be provided.[45] The voucher program died on February 14, 1997.

In September, 1997, various SGSM retirees and other former employees filed a class-action suit alleging that the food voucher program was a pension plan within the scope of ERISA. The class members are grouped as follows:

1. Group A: retirees who were actually receiving vouchers before the voucher program was terminated.
2. Group B-1: employees[46] aged 60 or older with at least 20 years service and one year supervisory experience, but had not retired as of February 14, 1997.
3. Group B-2: employees who, as of February 14, 1997, had 20 years service and one year of supervisory status but were under 60 and not retired.
4. Group C-1: employees, as of February 14, 1997, with 20 years of service, at least 60

[45] Schwegmann letter, dated 2/07/1997, R. 8-13, Exh. 2.

[46] "Employees" and "retirees" are altogether distinct.

years old but not retired and perhaps not a supervisor for one year.

5. Group C-2: employees, as of February 14, 1997, with 20 years service, but under age 60 and not retired. Supervisory status was questionable.

Only those plaintiffs in Group A satisfied all the voucher criteria in the Warnke memo, *supra*, as of February 14, 1997. Accordingly, these are the only plaintiffs who had the right to receive vouchers before the program terminated. Indeed, many plaintiffs are still not 60 years old.[47]

SUMMARY OF ARGUMENT

The district court and the court of appeals erred in holding that: (1) the grocery voucher program is an employee pension benefit plan covered by ERISA, (2) plaintiffs are entitled to money damages, (3) ERISA authorizes relief against parties other than the Pension Plan, (4) a section 502(a)(1)(B) remedy lies against a defunct plan with no assets, (5) extracontractual damages are recoverable under ERISA, (6) damages are alternatively justified as "appropriate equitable relief" under Section 502(a)(3), and (7) John Schwegmann is personally liable for damages as a plan fiduciary under ERISA.

The respective courts erred because: (1) The Supreme Court has consistently held that ERISA regulates only those benefits paid according to a strictly defined ERISA employee benefit plan, and it has honored the notion that in-kind benefits funded out of general assets are not ERISA benefits; (2) ERISA's application to non-cash

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[47] R. 3922-3979.

retirement benefits violates Congressional intent; (3) 29 U.S.C. § 1132(a)(1)(B) authorizes a money judgment only against the Plan; (4) the Supreme Court has emphatically declared that extracontractual damages are not available under ERISA; (5) the Supreme Court has held that money damages are not authorized by Section 502(a)(3); (6) the case law consistently holds that a corporate employee functioning purely as such is not personally liable for contributions to ERISA pension plans; and (7) the Fifth Circuit maintains that one is an ERISA fiduciary only in his capacity as a plan administrator; and, accordingly, if one is found to be free of liability as an administrator, he cannot be held liable as a fiduciary.

LAW AND ARGUMENT

I. THE DISTRICT COURT'S AND THE FIFTH CIRCUIT'S ERROR

The district court and the court of appeals, quite improperly, concluded that the grocery voucher program is an employee benefit plan covered by ERISA. The case law, as well as advisory notes issued by the DOL, have consistently repudiated the notion that ERISA applies to non-cash benefit plans.

The district court compounded its error by grossly misconstruing ERISA's civil enforcement remedies and by misapplying 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3).

II. THE DISTRICT COURT'S CATCH-22 REASONING ON JOHN SCHWEGMANN

The district court rendered a money judgment, *in solido*, against all defendants, except John F. Schwegmann, under 29 U.S.C. § 1132(a)(1)(B) and further concluded that "plaintiffs may recover the benefits they are owed directly from the Schwegmann partnership

[SGSM]."[48] For the above reasons, the adversely affected Schwegmann defendants challenge the finding that they are so liable.

With regard to John F. Schwegmann, the court declared:

> Although the Schwegmann partnership entity and its constituent partners (including SGSM, Inc.) are liable for benefits, Mr. Schwegmann faces no personal liability for SGSM, Inc.'s debt, absent some basis for piercing the corporate veil, solely by virtue of his status as an officer, board member, or shareholder of SGSM, Inc. See *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989).[49]

The court confirmed its dismissal of John Schwegmann from Section 1132(a)(1)(B) liability in its January 22, 2002, Minute Entry, *supra,* where it specifically stated that Schwegmann "is not personally liable as an administrator."

But the court also found that Mr. Schwegmann was a Plan fiduciary due to "the discretion and direct control that he exercised and/or had over the Plan's administration and assets, bringing him squarely within Section 1002(21)(a)'s[50] definition of a plan fiduciary."[51] Notably, the court conceded that Mr. Schwegmann, at no time, acted in his individual capacity as a fiduciary: "The court recognizes that Mr. Schwegmann likely exercised that control and authority while acting in his official capacity, as a corporate officer of SGSM, Inc."[52]

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[48] Page 54, Findings of Fact and Conclusions of Law, R. Excerpts, Tab 6.

[49] *Id.*, note 23 (of Findings and Conclusions).

[50] 29 U.S.C. § 1002.

[51] Page 57, Findings of Fact and Conclusions of Law.

[52] *Id.*

Quite perplexingly, the district court then abandoned its corporate-veil reasoning with the following pronouncement:

> However, under the broad scope of the ERISA fiduciary definition, corporate employees and officers who fit under Section 1002(21)(a), while acting on behalf of a corporate entity, face potential[?] (emphasis added) fiduciary liability in their individual capacities with no necessity of piercing the corporate veil. See *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1461 (9th Cir. 1995).[53]

The court embraced this notion of personal liability in spite of the Third Circuit's repudiation of it in *Confer v. Custom Engineering Co.*, 952 F.2d 34, 37, and n.4 (3rd Cir. 1991). In holding that John Schwegmann, individually, breached his duty as an ERISA fiduciary by "not [funding] the Plan and [by terminating] it without providing for protection of the plaintiffs' vested rights," the court cut off the branch after telling us that it could not be severed.

To be sure, the court also found that the SGSM partnership (and, therefore, the other Schwegmann defendants as constituent partners) breached its fiduciary duty. Those defendants challenge that holding. SGSM, plaintiffs' employer, terminated, incidental to its unavoidable business decision to sell its assets, an *unfunded* grocery voucher program. *Izzarelli v. Rexene Products Co., supra*, at page 1524 is squarely on point:

> . . . when an employer is also a fiduciary for its ERISA plans, it acts as a fiduciary "only when and to the extent that [it] function[s] in [its] capacity as a plan administrator, not when [it] conduct[s] business that is not regulated by ERISA." Citing *Hozier v. Midwest Easterners, Inc.*, 908 F.2d 1155, 1158 (3rd Cir. 1990).

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[53] *Id.*

Even if SGSM were a "fiduciary," the decision to liquidate Schwegmann and the resultant termination of the voucher program are not ERISA-governed activities:

> Business not regulated by ERISA has been widely held to include decisions to *amend or terminate ERISA plans*, as part of a balance between the employer's need to manage its business and Congress's "desire to regulate" ERISA plans . . . An employer is given broader discretion to act with regard to a plan when it does so as employer, instead of as fiduciary. Citing *Hozier, supra*, 908 F.2d at 1159-60.

The notion that SGSM had no control over the demise of the Schwegmann stores and the liquidation of all of their assets has never been challenged. Mr. Schwegmann's testimony is simplistic, yet profoundly explanatory:

> Q. . . . What ultimately compelled you to agree to the sale of the business?
>
> A. Simply said, Schwegmann Giant Supermarkets was losing money . . . And, in spite of total dedication, seven days a week, long, long days, we failed to execute properly the acquisition [of another food chain] which resulted in the entire company losing money. Our bankers lost confidence in us and would not lend us the additional sums of money that we were seeking. And we had no choice but to sell the company . . . And so we sold under great duress.
>
> Q. Why specifically couldn't you have kept up the grocery vouchers after the sale?
>
> A. We did not have the resources to do this. We were no longer in the retail business.[54]

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[54] Tr., pp. 288-290. R. Vol. 19.

In light of the undisputed facts, there can be no doubt that the termination of the voucher program, even if the program fell under ERISA, was not a fiduciary action.

Defendant, John Schwegmann, however, needs to advance additional arguments, relating specifically to the issue of personal liability.

III. JOHN SCHWEGMANN CANNOT BE INDIVIDUALLY LIABLE

Plaintiffs' original and amended complaints refer to Mr. Schwegmann as: vice-president and chief executive officer of SGSM, Inc., as chief executive officer of SGSM, as president of G.G. Schwegmann Co., Inc., and as a trustee of John Schwegmann, Jr. Trust Estate.[55]

Plaintiffs also named, not Mr. Schwegmann personally, but John Schwegmann "as chief executive officer [of SGSM, Inc.]" as "a fiduciary of the Pension Plan."[56] Plaintiffs pled no personal liability at all against Mr. Schwegmann; and, at least on the issue of Mr. Schwegmann's personal liability as a "Plan administrator," the court afforded him the protection of the corporate veil.

With regard to his status as a fiduciary, however, the court relied on Mr. Schegmann's official exercise of "discretion and direct control (emphasis added) . . . over the Plan's administration and assets . . . " As Mr. Schwegmann was a "control person," according to the court, he is personally liable. The court inexplicably ignored *Rockney v. Blohorn, supra*, which it had earlier relied on in holding

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[55] Article 6, Complaint and Amended Complaint, R. 277, *et seq.*, 264, *et seq.*

[56] Article VI(A), page 5, Pre-Trial Order. R. 3277, *et seq.*

that Mr. Schwegmann is not personally liable as Plan administrator under 29 U.S.C. §1132(a)(1)(B).

Rockney involves an action by four retired executives against two corporate officers and directors personally for ERISA pension benefits. Plaintiffs called the defendants "control persons," just as the court has designated Mr. Schwegmann.

In addressing the main issue of personal liability of corporate officers and directors as "control persons" under ERISA, the Eighth Circuit had this to say:

> . . . [W]e believe that, in the absence of any clear congressional intent to abrogate the long established corporate principle of limited liability, the courts should be reluctant to find that Congress intended to do so . . . The imposition of personal liability upon controlling persons of closely held corporations for contributions to pension plans would have far reaching consequences. The prospect that such person's individual assets could be taken to satisfy corporate obligations . . . would discourage such corporations from establishing or continuing pension plans for its employees . . . We hold that corporate officers cannot be held personally liable under ERISA where there is no basis for piercing the corporate veil.[57]

Nowhere do plaintiffs allege, and nowhere does the record show, that John Schwegmann ever abused his authority as an officer, director, employee, or representative of any of the separate and distinct entities: SGSM, SGSM, Inc., G.G. Schwegmann Co., and John Schwegmann, Jr. Trust Estate. The district court concedes as

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[57] *Rockney v. Blohorn*, 877 F.2d. at 642.

much in its Findings and Conclusions, *supra*: "The court recognizes that Mr. Schwegmann likely exercised that control and authority while acting in his official capacity as a corporate officer of SGSM, Inc."

Rockney relies on *Allied Trade Unions v. Kracher*:

> ". . . It is hornbook law that a corporate employee functioning purely as such [as the district court describes Mr. Schwegmann] acts not *as* but solely *for* the corporate employer . . . Such an employee or other agent who discharges some responsibility in regard to a corporation's employee benefit plan would be swept within the definition and thereby become an "employer" subject to liability for delinquent contributions."[58]

The Eighth Circuit affirmed the *Rockney* district court, which had advanced the notion that "employee benefit plans do not bind an individual who was not a signatory to the agreements or who has not expressly accepted liability through some other form of endorsement, guarantee, or express undertaking."[59] The *Rockney* court found no evidence that corporate officials accepted personal responsibility for the corporate ERISA plan benefits. Neither did the district court in the case at bar.

IV. LOCKHEED CORPORATION, ET AL. V. SPINK

The substance of plaintiffs' ERISA claim is Article 11 of its amended complaint.

> SGSM, the Pension Plan, and Schwegmann breached their fiduciary duties under 29 U.S.C. § 1104 by failing to provide [plaintiffs] with a

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[58] 856 F.2d. 1546 (D.C. Cir. 1988) at p. 1548.

[59] *Rockney*, at p. 643.

> summary description of the Pension Plan as required by 29 U.S.C. § 1022, and by failing to administer their duties with respect to the Pension Plan solely in the interests of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries.[60]

Plaintiffs are more specific in their "Summary of Material Facts" in the Pre-Trial Order.[61] The fiduciary obligations that Schwegmann allegedly breached involve the following *failures to act*, according to plaintiffs' pretrial order submissions:

> Schwegmann employees were not given prior written notice about the . . . vouchers, nor was the program reduced to writing other than the Warnke memo . . .
>
> Mr. Schwegmann did not set up a fund to finance the grocery voucher program; rather, vouchers were paid out of the company's general revenues.
>
> Mr. Schwegmann, a plan fiduciary, never sought any legal advice concerning his obligations regarding the . . . voucher program, at the time of closing nor at any other time.
>
> No Schwegmann retirees have received grocery vouchers since February, 1997 (when SGSM was sold and discontinued business); nor has Mr. Spitelera received his retirement check since that date.

Plaintiffs continue: "Since their inception in 1985, this was the only occasion, other than the death of the retiree, when any retiree had stopped receiving the retirement vouchers." Stated differently, and more accurately, the

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[60] See notes 2-7, *supra*.

[61] See note 9, *supra*.

retirees received everything they were entitled to prior to SGSM's unavoidable liquidation.

Nowhere, either in the complaint, amended complaint, the pre-trial order, or anywhere else, do plaintiffs allege anything that would warrant piercing the corporate veil to subject Mr. Schwegmann to personal liability as a plan fiduciary. Nothing changed at the trial. *Lockheed Corp., et al. v. Spink,* 517 U.S. 882 (1996) is especially crucial here because it broadens *Rockney's* alter-ego concept to encompass the status of the ERISA fiduciary. *Spink* is quite specific about what it takes to burden a corporate-officer fiduciary with personal liability:

> Section 406(a)(1) regulates the conduct of plan fiduciaries . . . When a fiduciary violates the rules set forth in § 406(a)(1), § 409 of ERISA renders him personally liable for any losses incurred by the plan, any *ill gotten profits*, and any other equitable or remedial relief . . . But in order to sustain an alleged transgression of § 406(a), a plaintiff must show that a fiduciary caused the plan to engage in the allegedly unlawful transaction.[62]

Spink is an extrapolation of *Rockney* to the Schwegmann situation. It holds that a fiduciary can be personally liable, i.e. his status as a corporate officer or director can be ignored, *only* when it can be shown that he caused the plan to engage in a criminally tainted transaction aimed at illicit profit. Such conduct calls for piercing the corporate veil. *Spink, supra*, at page 888. Unless plaintiffs show self-dealing in violation of Section 406, as opposed to mere

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[62] *Spink*, at 517 U.S. 888. Plaintiffs in Schwegmann plead a Section 404 breach. That section generally "imposes a duty of *care* with respect to the management [administration] of existing trust funds." *Spink*, p. 887. Section 409 is the provision that imposes *liability* for breach of either Section 404 or 406.

negligent breach of the Section 404 standard of care in plan management, they cannot hold a corporate officer/director who is a fiduciary personally liable for any losses they might suffer. Personal liability is reserved for fiduciaries who

> . . . cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.[63]

The Schwegmann plaintiffs have pled nothing beyond an alleged Section 404 violation of the fiduciary of the fiduciary obligations inherent in proper management and administration and in the disclosure of specific information. These allegations fall woefully short of the standard requisite to piercing the corporate veil. Personal liability of a fiduciary who is a corporate officer or director can attach only when the fiduciary causes the plan to engage in a transaction that "constitutes a direct or indirect . . . transfer to, or use by or *for the benefit of a party in interest* (emphasis added) of any assets of the plan. 29 U.S.C. § 1106(a)(1)(D)."[64]

V. THE DISTRICT COURT'S INCONSISTENCY

Beyond *Rockney* and *Spink*, however, there lies another conspicuous flaw in the district court's reasoning. On the one hand, the court relied on *Rockney* in concluding that "Mr. Schwegmann faces no personal liability for SGSM's debt [as an administrator under 29 U.S.C. § 1132(a)(1)(B)]." On the other hand, the court employed

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[63] *Spink*, at p. 888.

[64] *Spink*, at p. 892.

Schwegmann's administrator status to find him liable as a fiduciary:

> [Schwegmann was a Plan fiduciary due to] the discretion and direct control that he exercised and/or had over the Plan's administration (emphasis added) and assets . . .[65]

The district court's incongruous exercise ignores the rule advanced (earlier on page 24) in *Hozier* and *Izzarelli*, *supra* (in the additional context), that

> . . . when an employer is also a fiduciary for its ERISA plans, *it acts as a fiduciary "only when and to the extent that [it] function[s] in [its] capacity as plan administrator* (emphasis added), not when it conducts business that is not regulated by ERISA." *Izzarelli*, citing *Hozier*, 24 F.3d at page 1524.

The Court cannot have it both ways. If Schwegmann is not liable as an administrator, he cannot be liable as a fiduciary.

VI. MONEY DAMAGES ARE NOT AVAILABLE TO PLAINTIFFS

Liability aside, the recent case of *Great-West Life and Annuity Ins. Co. v. Knudson*, 534 U.S. _____, 70 U.S.L.W. 4056 (January 8, 2002) precludes a money judgment against SGSM (and its constituent partners) or against John Schwegmann individually, as a fiduciary. The measure of fiduciary liability is expressed in 29 U.S.C. § 1132(a)(3), and, according to *Great-West*, only *equitable* relief is available, under Section 1132(a)(3), for breach of

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[65] Page 57, Findings and Conclusions. The court's January 22, 2002 Minute Entry (note 27, *supra*) stated that Schwegmann is *not* personally liable as Plan administrator.

fiduciary duty. Money damages is not an equitable remedy and are therefore inapplicable to breach of fiduciary duty causes of action.[66]

Accordingly, any money judgment against Schwegmann, personally, or against SGSM and its constituent partners for breach of fiduciary duty is unwarranted. See also *Howe v. Variety Corp.*, 36 F.3d 746 (8th Cir. 1994), *affirmed, Variety Corp. v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed. 2d 130 (1996).

Additionally, as USF&G argues in its appeal, money damages under 29 U.S.C. § 1132(a)(1)(B) are not allowable because they amount to extra-contractual relief.

VII. ASSUMING ERISA APPLICATION, NONE OF THE PLAINTIFFS WAS VESTED

At first glance, only the Group A class members could conceivably be entitled to anything. None of the class members in Groups B-1, B-2, C-1, and C-2 satisfied all of the voucher prerequisites as of February 14, 1997, the date of SGSM's passing. Accordingly, they were not "vested"; they did not have the right to receive vouchers before the program terminated. *Curtis-Wright Corporation v. Schoonenjongen*, 514 U.S. 72, 78, 115 S.Ct 1123, 1228, 131 L.Ed. 2d 94 (1995); *Mohalley v. Kendall Health Care Products, Inc.*, 903 F. Supp. 1530, 1537 (M.D. Ga. 1995); and *Wayman by Matthews v. Colonial Penn Life Ins. Co.*, 805 F. Supp. 525 (E.D. Tenn. 1992).

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[66] USF&G has briefed the damages issue in considerable detail, and Schwegmann defendants adopt USF&G's arguments there. Again, Schwegmann defendants do *not* adopt USF&G's arguments that the Schwegmann defendants were fiduciaries and that the insurance policy question does not cover the ERISA action.

If ERISA applies, the benefits sued upon should be classified, unequivocally, as *welfare*, not pension, benefits. See 29 U.S.C. § 1002(2)(A) and 29 U.S.C. § 1002(1) as discussed in *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668. Plaintiffs have labeled the vouchers "pension" benefits because, in that case, vesting is presumed. Plaintiffs want, at all costs, to avoid the burden to prove that any benefits to which they may be entitled had vested under the "plan's" terms. *Hughes v. 3M Retiree Medical Plan*, 134 F. Supp. 2d 1062, 1069 (D. Minn. 2001), citing *Howe v. Variety Corp.*, 896 F.2d 1107, 1009 (8th Cir. 1990). The district court was beguiled by plaintiff's pension fallacy.

Assuming pension status, however, there is absolutely nothing in the record to indicate that a Schwegmann retiree's receipt of food vouchers became "fixed and inviolate [i.e., vested] upon retirement."[67] Schwegmann's unambiguous proviso that the vouchers would continue only as long as Schwegmann "was in the grocery business,"[68] along with the fact that they were non-transferable and did not survive the death of the retiree,[69] veritably rebuts the vesting presumption and affirms SGSM's right to terminate the plan. *Howe v. Variety Corp., supra,* 36 F.3d at 752. There is nothing in the Schwegmann voucher plot to give rise to any reasonable expectation that vouchers would survive the demise of SGSM.

Therefore, none of the plaintiffs, not even Group A retirees, would be entitled to prospective benefits (beyond February 14, 1997). SGSM's "unqualified reservation of its

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[67] *Hughes, supra,* at p. 1070.

[68] Notes 35, 40, and 42, *supra.*

[69] Note 44, *supra.*

right to . . . terminate [any] plan[70] . . . as a matter of law, defeats [the] claim that the benefits provided are vested." *Hughes, supra,* 134 F. Supp. 2d, at 1072, *Howe, supra,* 896 F.2d at 1109.

VIII. CONCLUSION.

The Schwegmann defendants adopt and incorporate herein by reference all arguments advanced by USF&G relating to: (1) ERISA's non-application to the Schwegmann voucher scenario, (2) the district court's improper compensatory damage award, which is not a permissible remedy under any of ERISA's civil enforcement provisions, (3) the district court's erroneous award against defendants other than the Pension Plan (assuming, *arguendo*, ERISA application and the propriety of the award itself), (4) the district court's erroneous granting of relief despite the Plan's defunct status, and (5) any and all other matters relating to ERISA application and compensatory damages.

This Court should reverse the court of appeals' affirmation of the district court's rulings on the above ERISA issues as regards all Schwegmann defendants. If this Court affirms the district court's ERISA (and fiduciary liability) rulings, it should modify the relief according to the above arguments.

Respectfully submitted,

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[70] The rigid condition that the vouchers would continue only as long as Schwegmann (SGSM) remained in the grocery business is, indeed, an unqualified reservation.

REVISED JUNE 13, 2003

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 02-30246

JOHN MUSMECI; CARROL BOUDREAUX; WILLIE BLANCHARD; MELVIN CAMET, SR.; JOSEPH DECUIR; MAURICE MIRANDA; JACQUELINE S. PALAMA; VICTOR SCHAMBRA; BRUCE SOLOMONS; JOSEPH T. SPITELERA; AUDREY TOAL; on their own behalf and on behalf of all similarly situated employees; YVONNE WHITE; CYNTHIA NORMAND; CHARLES CARROL DIONNE; JOSEPH O'NEIL DIONNE,

Plaintiffs-Apellees,

VERSUS

SCHWEGMANN GIANT SUPER MARKETS, INC.; SCHWEGMANN GIANT SUPER MARKETS PENSION PLAN; JOHN F. SCHWEGMANN; G.G. SCHWEGMANN CO.; JOHN SCHWEGMANN, JR. TRUST ESTATE; UNITED STATES FIDELITY & GUARANTY COMPANY,

Defendants-Appellants,

Appeal from the United States District Court
For the Eastern District of Louisiana

(Filed June 11, 2003)

Before KING, Chief Judge DAVIS, Circuit Judge and LITTLE, District Judge,* W. EUGENE DAVIS, Circuit Judge:

Defendants, Schwegmann Giant Super Markets, Inc. (SGSM, Inc.), Schwegmann Giant Super Markets Pension Plan (SGSM Pension Plan), John F. Schwegmann, Jr. (Mr. Schwegmann), G.G. Schwegmann Co. (G.G. Schwegmann), John Schwegmann, Jr. Trust Estate (Schwegmann Trust) (collectively the "Schwegmann Defendants"), and United States Fidelity & Guaranty Company (USF&G) (collectively the "Defendants"), appeal the district court's adverse money judgment, in favor of the Plaintiff class, holding, *inter alia,* that a grocery Voucher Plan established by Schwegmann Giant Super Market Partnership (SGSM) was a pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1461, that the Plaintiffs were entitled to monetary relief, and that a self insured retention (SIR) in a USF&G policy covering SGSM's liability for employee benefits incidents could be applied once to Plaintiffs' claims collectively. We agree with the district court except with respect to defendant USF&G. We conclude that the SIR in USF&G's policy applies to each class member's claim. Because no individual claim exceeds the SIR, we vacate the judgment against USF&G.

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* District Judge of the Western District of Louisiana, sitting by designation

I.

Until 1997, SGSM operated a chain of over forty grocery stores, employing over 5000 employees, primarily in the New Orleans, Louisiana area. SGSM is a partnership comprised of SGSM, Inc., G.G. Schwegmann, and Schwegmann Trust. SGSM, Inc. owned a seventy percent interest in the partnership and was its managing partner. Mr. Schwegmann was the majority stockholder of SGSM, Inc. and its chief executive officer. As such, Mr. Schwegmann was responsible for the daily operations of SGSM and was the primary policy maker for the partnership.

Mr. Schwegmann conceived a plan for SGSM to give its retirees groceries and other goods free of charge. Mr. Schwegmann then worked with Mr. Sam Levy, president of SGSM, Inc., and Mr. Joe Warnke, SGSM director of human resources, to create a voucher program for long-term SGSM employees at their retirement. In 1985, SGSM implemented this grocery voucher plan (the "Voucher Plan") designed to supply SGSM retirees with a portion of their monthly food needs. Under this plan, SGSM issued vouchers to retirees, and these vouchers could then be used in lieu of cash to purchase goods in SGSM stores. It is this Voucher Plan which is the subject of this lawsuit.[1]

In 1985, Joe Warnke prepared a memorandum memorializing the eligibility requirements for participation in

[1] Joseph T. Spitelera, a non-class plaintiff, retired in 1980. Rather than receiving vouchers, Mr. Spitelera received $305 dollars per month from SGSM. Many of the arguments regarding whether the Voucher Plan was an ERISA plan do not apply to Mr. Spitelera's individual claims.

the Voucher Plan.[2] To qualify for the vouchers, an employee must have completed twenty years of service with SGSM, have reached the age of sixty, and have been employed in a supervisory position for at least one year at the time of retirement. SGSM informed qualifying employees of the program at the time of their retirement. Each month, SGSM sent qualifying employees a set of four vouchers worth a total of $216. These vouchers were valid for a period of thirty days, redeemable only at SGSM stores and could not be transferred. Although SGSM intended the vouchers to be used only for in-kind purchases with no cash redemption, store personnel, including managers, were largely unaware of this proscription, and retirees were often given change in cash when using the vouchers for grocery purchases.

SGSM had no written procedures for administering the Voucher Plan. The Voucher Plan was nonetheless run in a systematic manner. When a manager or supervisor retired, the SGSM human resources department prepared a form with information used to determine whether the employee qualified for the Voucher Plan. The form was

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[2] The memorandum reads in part:

To: Mr. John F. Schwegmann
From: Joe Warnke
Subject: Retirement/Compensation

I have prepared notes of our conversation of July 2, 1985 in order to preserve our memory and serve as a reminder to complete this project.

REQUIREMENTS:

* Must have completed twenty (20) years of service.

* Must have achieved the age of sixty (60).

* Must have been employed in a position of supervisor or a position of greater responsibility for at least one year at the time of retirement.

then sent to Sam Levy who reviewed the form and decided whether a retiree qualified for the program. Levy would sign the forms of qualified retirees and forward the forms to the SGSM controller, Gene Lemoine, who issued the vouchers. Lemoine performed this task two to three days before the month in which they were to be used. Once used, the vouchers were routed back to Lemoine who retained them for five years.

SGSM did not set up a trust to fund the Voucher Plan. Rather, the Voucher Plan was funded out of the partnership's general revenue. Each year, SGSM deducted the total face value of the vouchers as a business expense on its tax returns under the category of "retirement plans, etc." SGSM also issued an Internal Revenue Service form 1099-R to every retiree receiving vouchers, reflecting the face value of the vouchers received by the retiree that year.

By the early 1990's, SGSM experienced declining profits due to competition from well-financed national supermarket chains. In 1995, Mr. Schwegmann decided to aggressively expand SGSM to compete with these stores. SGSM acquired the 28-store National Tea Company chain and, in doing so, undertook a sizable debt. After this acquisition, SGSM continued to suffer from financial losses, and in 1997, it sold the business. A week before the sale, Mr. Schwegmann sent a letter to all voucher recipients informing them that they would no longer receive vouchers because of the sale of the business. Because Mr. Schwegmann considered the Voucher Plan a gratuity subject to termination at will, he made no provision for the continuation of the Voucher Plan after the sale.

When Mr. Schwegmann sent the letter to the retirees, SGSM was insured under a USF&G excess general liability policy with a self-insured retention (SIR) of $1 million per claim and a premium of $200,000. The policy included Excess Employee Benefits Liability coverage. This policy was not due to expire until July 1997; however, because of the impending sale, the policy was cancelled. In its place, a similar policy was issued to cover SGSM's remaining liability while it was winding up its business. This policy had a lower premium of $25,000 and a lower SIR of $250,000 for each claim. Both policies were "claims made" policies rather than "occurrence" policies.

After being informed of the termination of the Voucher Plan, Plaintiffs filed this suit on behalf of themselves and other similarly situated individuals under ERISA and Louisiana state law claiming that they were vested in a pension benefit plan. Plaintiffs are former employees of SGSM who were adversely affected by the termination of the grocery Voucher Plan when SGSM sold its business in February 1997. The matter was certified as a class action, defining the plaintiff class as:

> Those individuals who were SGSM employees and (1) who were retired and receiving grocery vouchers when SGSM stopped the program, or (2) who, although not retired or receiving grocery vouchers at the time SGSM stopped the grocery program, were (i) supervisors for at least one year before retirement, and (ii) had at least 20 years experience with SGSM.

After a bench trial, the court dismissed the Plaintiffs' state law claims. After taking the remaining claims under advisement, the court issued findings of fact and conclusions of law, ruling that the grocery Voucher Plan was a

pension benefit plan under ERISA, that SGSM breached its fiduciary duty under ERISA, that Mr. Schwegmann was liable as a fiduciary to the plan, that the Plaintiffs were entitled to monetary relief for benefits denied after SGSM's sale, that USF&G's policy covered SGSM's liability, and that the policy's SIR applies once to the Plaintiffs' claims collectively. However, the court requested additional briefing on the issue of class membership. Based on the stipulations of the parties and the evidence presented at the hearing, the district court determined that all but seven individuals filing a notice of claim qualified for class membership. Thereafter, the district court issued a final judgment consistent with its findings.

The Defendants lodged a timely appeal, urging various grounds for reversal. We address each of the Defendants' arguments in turn.

II.

While not disputing the underlying facts, USF&G first argues that the district court committed legal error in concluding that the in-kind Voucher Plan constituted a pension benefit plan under ERISA. The Schwegmann Defendants have adopted USF&G's argument by reference. Specifically, the Defendants contend that ERISA does not apply to any program providing a non-cash benefit. This court reviews legal challenges *de novo. Brittan Communications Intern. Corp. v. Southwestern Bell Telephone Co.,* 313 F.3d 899, 906 (5th Cir. 2002).

ERISA does not regulate all benefits paid by an employer, but only those paid pursuant to an "employee benefit plan." *Fort Halifax Packing v. Coyne,* 482 U.S. 1, 11, 107 S.Ct. 2211, 2217 (1987); 29 U.S.C. § 1003. Two

different types of benefit programs are regulated by ERISA: welfare plans and pension plans. 29 U.S.C. § 1002. The district court determined that the Voucher Plan was a pension benefit plan and not a welfare benefit plan. The Plaintiffs have not challenged this ruling. The Defendants, however, challenge the district court's determination that it is a pension benefit plan.

To determine whether ERISA applies to the Voucher Plan, we begin our analysis with an examination of the language of the statute itself. ERISA defines an "employee pension benefit" plan as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program . . . provides retirement income to employees . . . 29 U.S.C. § 1002(2)(A)(i).

The parties agree that SGSM established a "program." Thus, the primary issue this court must resolve is whether the vouchers issued pursuant to SGSM's Voucher Plan provided the Plaintiffs with "retirement income."

Neither ERISA's statutory provisions nor the federal regulations define the term "income." However, they do not affirmatively require that the pension benefit be paid in cash. Moreover, the Department of Labor (DOL) refused to declare as a general policy whether in-kind benefits are regulated by ERISA. See ERISA Advisory Op. (March 26, 1999), 1999 ERISA LEXIS 11. We have likewise found no controlling case law directly addressing the issue.

Relying on the definition of "income" used for the purposes of determining taxable income under the

Internal Revenue Code (IRC), 26 U.S.C. § 1, *et seq.*, the district court found that the grocery vouchers constituted retirement income. We believe that the district court's analysis is sound given the close connection between ERISA and the IRC.

Congress dedicated Title II of ERISA entitled "Amendments to the Internal Revenue Code Relating to Retirement Plan," (Title II), to addressing taxation of retirement plans. Pub. L. 93-406, 88 Stat. 829, Sec. 1001, *et. seq.* Title II amends provisions of the IRC and sets forth guidelines and standards governing the establishment and operation of pension plans qualified for favorable tax treatment. Pub. L. 93-406, 88 Stat. 829, Sec. 1001, *et. seq.*; *Cafee, Halter & Griswold, et al. v. Commissioner of Internal Revenue,* 88 T.C. 641, 650 (1987). Title I sets out guidelines and standards governing the establishment and operation of pension plans. Title I, which defines "employee benefit plan," was drafted in concert with Title II. Pub. L. 93-406, 88 Stat. 829, et. seq; *Cafee, Halter & Griswold, et al. v. Commissioner of Internal Revenue,* 88 T.C. 641, 651. Much of Title I of ERISA was duplicated in Title II, indicating that overlapping terms should be consistently defined in both. *Esden v. Bank of Boston,* 229 F.3d 154, 158 (2nd Cir. 2000); See e.g. 26 U.S.C. § 411(a)(7) and 29 U.S.C. § 1002(23) (same definition of "accrued benefit"); 26 U.S.C. § 411(a)(8) and 29 U.S.C. § 1002(24) (same definition of "normal retirement age"); 26 U.S.C. § 411(a)(9) and 29 U.S.C. § 1002(22) (same definition of "normal retirement benefit").

We acknowledge that courts generally do not look to other statutes to determine the meaning of a term where an act has left that term undefined. See e.g. *Lukhard v. Reed,* 481 U.S. 368, 107 S.Ct. 1807 (1987) (relying on the

general meaning of "income" for the purposes of determining whether personal injury awards were included as income under the Aid to Families with Dependant Children program). In such instances, courts rely on common usage to give the term meaning. However, in this instance, we believe that the interconnection between ERISA and the IRC reflects an intent to use common terminology.

This court has interpreted the term income broadly under the IRC to include anything that can be valued in terms of currency. *United States v. Parr,* 509 F.2d 1381, 1385 (5th Cir. 1975) (citing *Commissioner v. John Smith,* 324 U.S. 177, 65 S.Ct. 591 (1945)). The district court was entitled to infer that when SGSM deducted the vouchers' face value as a business expense on its tax returns under the category of "retirement plans" and issued Internal Revenue Service form 1099-R's to the recipients of the vouchers, SGSM considered the vouchers as income under the IRC. The cash value of the grocery vouchers is readily ascertainable from the face of the vouchers. The district court correctly concluded that the vouchers constitute income and the Voucher Plan is governed by ERISA.

Even if we were to adopt the plain or ordinary meaning of "income," our conclusion would be the same. As noted by the Supreme Court in *Lukhard v. Reed,* the term "income" is commonly understood to mean a "gain or recurrent benefit usually measured in money." *Lukhard v. Reed,* 481 U.S. 368, 374 (citing Webster's Third International Dictionary 1143 (1976)). Because the vouchers provided a gain or benefit to SGSM employees and could readily be measured in money, they would constitute income as the term is generally understood.

We are not persuaded that any of the authorities cited by the Defendants would dictate a contrary result. The Defendants contend that the Voucher Plan is not an employee pension plan because it constitutes a "sale to an employee" which is excluded from the scope of ERISA under DOL regulations. The regulation to which the Defendants refer provides:

> (e) Sales to employees. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include the sale by an employer to employees of an employer, whether or not at prevailing market prices, of articles or commodities of the kind which the employer offers for sale in the regular course of business. 29 C.F.R. § 2510.3-1(e).

As the Defendants point out, the regulation does not impose any limitation on the price at which the merchandise is sold, whether at prevailing market price or at a deeply discounted price. However, we agree with the district court that SGSM's transfer of vouchers to its employees bear none of the hallmarks of a sale.[3] SGSM received no money or anything else of value in exchange for the vouchers or for the groceries. The parties never intended for the retiree to pay for the vouchers. The transactions are much closer to gifts by SGSM. This comports with the gratuitous intent expressed by Mr. Schwegmann in his testimony. As noted by the district

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[3] sale, *n. 1.* The transfer of property or title for a price. *2.* The agreement by which such a transfer takes place. * The four elements are (1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised. *Black's Law Dictionary* (7th Ed. 1999).

court the Voucher Plan "did not just offer goods for sale to its employees – it provided them with a means to pay for them." *Musmeci v. Schwegmann Giant Super Markets,* 159 F.Supp.2d 329, 345 (E.D. La. 2001). The district court equated this to conferring "cash spending power," distinguishable from a program that simply allowed retirees to use their own funds to purchase groceries from SGSM stores. *Id.* We agree with the district court that these transactions were not sales by an employer to an employee. Thus, we find Defendant's argument on this point unpersuasive.

The Defendants next argue that the case law dictates that no in-kind benefit can ever be covered by ERISA. The cases relied on by the Defendants are district court cases, several of which are unpublished, involving airline programs allowing their employees and retirees to fly free or at reduced rates.[4] See *Constantine v. American Airlines Pension Benefit Plan,* 162 F.Supp.2d 552 (N.D. Tex. 2001); *Preuc v. Continental Micronesia, Inc.,* No. 96-00017, 1997 WL 538933 (Dist. Guam Aug., 29, 1997); *Prince v. American Airlines, Inc.,* No. 97-7231, 1999 WL 796178 (S.D.N.Y. Oct. 6, 1999); *Eaton v. Delta Airlines, Inc.,* No. 87-748, 1988 U.S. Dist. LEXIS 15986 (W.D. Wash. May 25, 1988).

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[4] The only case outside of this context is *Jervis v. Elerdling,* 504 F. Supp. 606 (C.D. Cal. 1980). In *Jervis,* the court addressed whether an agreement in which the employer agreed to provide rent-free housing to the employee upon termination or retirement provided for a ERISA pension plan. The court held it did not, relying largely on the fact that the agreement to provide housing was made pursuant to a formal employment contract negotiated by an employer and an individual employee. The fact that the agreement provided for in-kind compensation was not discussed by the court in reaching its conclusion. Thus, the case does not stand for the position espoused by the Defendants.

Significantly, these cases involve travel benefits in what would otherwise be an empty seat.

Treating the issue in a summary fashion, each court concluded with little or no analysis that travel benefits were not ERISA pension benefit plans because they did not provide "income" to the retiree. Had the courts looked to the IRC to determine whether the travel benefits were income, they would have answered this question in the negative because these benefits provided a "no-additional-cost-service." *See* 26 U.S.C. § 132(a)(1).

Finally, the Defendants relying on *Preuc v. Continental Micronesia, Inc., supra,* argue that in-kind programs are not the sort of plans with which ERISA is concerned. The district court in *Preuc* concluded that unfunded, in-kind programs permitting employees a free standby seat on the employer's airplane paid out of the general assets of the employer are generally not ERISA benefit plans.

The *Preuc* court relied in part on the general purpose behind ERISA as expressed by the United States Supreme Court in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.,* 519 U.S. 316, 117 S.Ct. 832 (1997). The *Dillingham* Court noted that the primary purpose of ERISA was to prevent the mismanagement of "funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Id.* at 326-327. (citing *Massachusetts v. Morash,* 490 U.S. 107, 115, 109 S.Ct. 1668, 1673 (1989)). The *Dillingham* Court concluded that it is only when money is included in a special fund to finance the benefit that ERISA's coverage is triggered. *Id.* at 326. However, the facts and legal issues presented in *Dillingham* bear no resemblance to this case.

Dillingham is a preemption case. The Court examined whether a California wage statute (California Statute) was preempted by ERISA. The California Statute allowed contractors to pay a lower apprentice wage, (rather than a higher journeyman wage), only if the apprentice was trained in an approved apprenticeship program as defined by the California statute. Under ERISA, certain apprenticeship programs as defined by ERISA are considered welfare benefit plans. 29 U.S.C. § 1002(1). The qualifying apprenticeship programs, however, are defined differently by the federal and state statutes. The Court declined to hold that the California Statute was preempted by ERISA because California had different standards than ERISA for apprenticeship programs. Specifically, the Court held that an apprenticeship program maintained by a single employer under the California Statute and paid through the employer's general assets was not an ERISA plan. Rather, the "benefits" of these programs are part of the employee's wages. The Court observed that the risk involved in failing to fund an apprentice wage program is "indistinguishable from 'the danger of defeated expectations of wages for services performed,' a hazard with which ERISA in [sic] unconcerned." *Id.* at 327. (Citing *Massachusetts v. Morash,* 490 U.S. 107, 115).

We are satisfied the *Preuc* court read *Dillingham* much too broadly. The Supreme Court was concerned with distinguishing programs where employers fund ERISA plans from programs where employers provide funds to pay wages. The Court did not purport to impose a general limitation on the application of ERISA to plans in which the employer had accumulated funds.

Our interpretation of *Dillingham* is consistent with *Massachusetts v. Morash* which, likewise, addressed an

issue related to the payment of wages. Like *Dillingham*, *Massachusetts v. Morash* is a preemption case. The case involved a Massachusetts statute requiring employers to pay discharged employees their wages in full on the day of their discharge. *Massachusetts v. Morash,* 490 U.S. 107, 110. The Massachusetts statute defined wages to include holiday or vacation pay. *Id.* Under ERISA, certain programs providing vacation benefits are welfare benefit plans. 29 U.S.C. § 1002(1). However, the Court declined to hold that the Massachusetts statute requiring the employer to pay for unused vacation time constituted an ERISA welfare benefit plan. *Massachusetts v. Morash,* 490 U.S. 107, 114.

The Court found that, when a single employer paid an employee vacation pay out of the company's general assets, this practice was similar to other "payroll practices" outside of the scope of ERISA. *Id.* at 118. (Citing 29 C.F.R. § 2510.3-1(b) (providing that overtime, shift premiums, holiday premiums and weekend premiums paid as compensation for work performed are not welfare benefit plans under ERISA)). "[E]xcept for the fact that the payment has been deferred, such payments are as much a part of the employees' regular basic compensation as overtime pay or the payment of salary while the employee is absent on vacation." *Id.* at 120. "States have traditionally regulated the payment of wages, including vacation pay." *Id.* at 119. The Court reasoned that the fact that payments for unused vacation were due at termination did not affect their character as regular compensation. *Id.* at 120.

Because the SGSM Voucher Plan, designed to benefit *retired* employees, is unrelated to the payment of wages, *Dillingham* and *Massachusetts v. Morash* are inapplicable. Accordingly, the Defendants' arguments that a plan to pay

benefits from current earnings cannot constitute an ERISA plan is not supported by the holdings or reasoning of these cases.

III.

USF&G next argues that even if the Voucher Plan is governed by ERISA, the plaintiffs are not entitled to relief. The Schwegmann Defendants have again adopted USF&G's argument by reference.

Specifically, the Defendants contend that, because Section 502(a)(1)(B) allows only the recovery of "plan benefits," plaintiffs may recover only grocery vouchers (which are now worthless) under ERISA and not their cash equivalent. 29 U.S.C. § 1132(a)(1)(B).

Section 502(a)(1)(B) reads:

> (a) Persons empowered to bring a civil action. A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

While we have found no case law considering the measure of damages where a plaintiff has been denied an in-kind benefit under a pension plan, Section 502(a)(1)(B) also applies to welfare benefit plans. Welfare benefit plans offering healthcare benefits typically provide for medical treatment, an in-kind benefit. Participants are clearly entitled to the value of health care benefits when the participant personally pays for treatment which has been

wrongfully denied. See *Roark v. Humana Inc.*, 307 F.3d 298, 309 (5th Cir. 2002); *Dowden v. Blue Cross & Blue Shield, Inc.*, 126 F.3d 641 (5th Cir. 1997) (*per curiam*). To hold otherwise would put a participant in a medical benefit plan in the untenable position of either (1) foregoing potentially life-saving medical treatment until the right to the treatment is conclusively litigated or (2) personally paying for the treatment without the right to recover its cost.

Citing case law rejecting recovery of tort and punitive damages under ERISA, the Defendants argue that the district court's award of monetary damages is a prohibited "extracontractual" remedy. See e.g. *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321 (5th Cir. 1992) (rejecting a claim for emotional distress under ERISA). These cases are not helpful to Defendants because they do not address whether in-kind plan benefits – which have been denied – can be measured in terms of a monetary award. We see no good reason why the district court was prohibited from making a monetary award. The classic measure of contract damages is the value of the thing of which the plaintiff has been deprived by the breach. *Liberty Bank v. Talman Home Mortg. Corp.*, 877 F.2d 400, 406 (5th Cir. 1989). We are satisfied that the same measure of damages, the value of the benefit denied, is the appropriate measure of damages in this case.[5] Accordingly, monetary relief in the amount of the benefit denied is the appropriate remedy.

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[5] Because we have found a remedy is available at law under Section 502(a)(1)(B), the Plaintiffs are foreclosed from equitable relief under Section 502(a)(3). *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708 (2002).

IV.

While acknowledging that the issue has never been addressed by the Fifth Circuit, USF&G contends that Section 502 limits the source of recovery to the amounts of the plan so that the pension plan itself is the only party properly named as a defendant. The Schwegmann Defendants have also adopted this argument.

The Defendants rely primarily on the language of Section 502(d)(2), which reads as follows:

> Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter. 29 U.S.C. § 1132(d)(2).

While the language suggests that the plan is the only proper party defendant, other Circuits have allowed employees to maintain actions against their employers for the denial of benefits under facts similar to those in this case. See *Mein v. Carus Corporation,* 241 F.3d 581 (7th Cir. 2001); *Garren v. John Hancock Life Insurance,* 114 F.3d 186 (11th Cir. 1997); *Layes v. Mead Corporation,* 132 F.3d 1246 (8th Cir. 1998); *Sweet v. Consolidated Aluminum Corporation,* 913 F.2d 268 (6th Cir. 1990). These cases hold that the plan beneficiaries can sue the employer when it was the employer's decision to deny benefits. *Sweet v. Consolidated Aluminum Corporation,* 913 F.2d 268 (6th Cir. 1990) and when the employer is the plan administrator or sponsor. *Garren v. John Hancock Life Insurance,* 114

F.3d 186 (11th Cir. 1997); *Layes v. Mead Corporation,* 132 F.3d 1246 (8th Cir. 1998).[6]

In this case, Plaintiffs named both the SGSM Pension Plan and SGSM as defendants in this lawsuit. SGSM is both the "plan administrator" and "plan sponsor." The SGSM Pension Plan has no meaningful existence separate from SGSM because the Voucher Plan is funded by the general assets of the partnership. Moreover, it was indisputably SGSM's decision to deny further vouchers or their cash equivalent to the Plaintiffs. Under these facts, the district court correctly held that SGSM was properly named as a defendant.

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[6] "Administrator" is a defined term under ERISA. 29 U.S.C. § 1002(16)(A). 29 U.S.C. § 1002(16) reads:

> (A) The term "administrator" means –
>
> (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
>
> (ii) if an administrator is not so designated, the plan sponsor; or
>
> (iii) in the case for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.
>
> (B) the term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, . . .

As there is no instrument designating a plan administrator, SGSM is "plan administrator" under (A)(ii) because it is the "plan sponsor" under subsection (B) of the statute.

V.

Next, the Schwegmann Defendants argue that the district court erred in casting John Schwegmann, Jr. in judgment as a fiduciary to the Voucher Plan. Relying on *Rockney v. Blohorn,* 877 F.2d 637 (8th Cir. 1988), the Schwegmann Defendants contend that Mr. Schwegmann has no personal liability because the district court rejected Plaintiffs' attempt to pierce the corporate veil. However, *Rockney v. Blohorn* is inapposite.

Rockney addressed the liability of a corporate officer who was sued under the theory that he was the employer and plan administrator for the purposes of ERISA. Here, the district court predicated Mr. Schwegmann's liability on a finding that Mr. Schwegmann was a plan fiduciary, not that he was Plaintiffs' employer or the plan administrator. This is an independent basis for liability unrelated to whether he was also the Plaintiffs' employer under a veil piercing theory.

Under ERISA, a person is a fiduciary with respect to a plan to the extent:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 USCS § 1105(c)(1)(B)]. 29 U.S.C. § 1002(21)

In concluding that Mr. Schwegmann was a plan fiduciary, the district court relied on *Kayes v. Pacific Lumber Company,* 51 F.3d 1449 (9th Cir. 1995). In *Kayes,* the Ninth Circuit acknowledged that ERISA adopted a functional approach to determining whether an individual was liable as a fiduciary. The court held two corporate officers personally liable as plan fiduciaries because of the role they played in the management of the plan's assets, despite the fact that the ERISA plan designated the corporate employer as the plan fiduciary.[7] The *Kayes* court noted that to hold otherwise would allow a corporation to shield its officers from liability under ERISA and relieve them of their fiduciary duty. *Id.* at 1460. In *Bannistor v. Ullman,* 287 F.3d 394, 403-404 (5th Cir. 2002), we confirmed that this Circuit uses the same functional approach as the Ninth Circuit in *Kayes,* stating:

> The term "fiduciary" is liberally construed in keeping with the remedial purpose of ERISA. *Am. Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the United States,* 841 F.2d 658, 662 (5th Cir. 1988). "The phrase 'to the extent' indicates that a person is a fiduciary only with respect to those

[7] In doing so, the *Kayes* court expressly rejected the approach taken by the Third Circuit in *Confer v. Custom Engineering Co.,* 952 F.2d 34 (3rd Cir. 1991) which held that when a plan has designated a corporation as its fiduciary, only the designated fiduciary is chargeable for a breach of a fiduciary duty. In the present matter, the district court distinguished *Confer* on the grounds that there was no written plan in this case designating a corporate fiduciary. This is consistent with the holding of the Ninth Circuit in *Yeseta v. Baima,* 837 F.2d 380 (9th Cir. 1988), which was recently cited with approval by this court in *Bannistor v. Ullman,* 287 F.3d 394 (5th Cir. 2002).

> aspects of the plan over which he exercises authority or control." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987); 479 U.S. 1089, 107 S.Ct. 1298, 94 L.Ed.2d 154. However, " 'fiduciary' should be defined not only by reference to particular titles, . . . but also by considering the authority which a particular person has or exercises over an employee benefit plan." *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984).

Thus, the district court correctly held that Mr. Schwegmann could be liable as a fiduciary even if he is not the Plaintiffs' employer under a veil piercing theory.

VI.

Rather than contesting whether Mr. Schwegmann exercised the requisite control or authority over the plan sufficient to establish a fiduciary duty, the Schwegmann Defendants next argue that the decision to liquidate SGSM and end the Voucher Plan was not a fiduciary action. The Schwegmann Defendants are correct that the decision to terminate a plan under ERISA does not constitute a breach of fiduciary duty. See *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994). The court, however, did not impose liability against Mr. Schwegmann because he terminated the plan. Instead, the district court predicated Mr. Schwegmann's fiduciary liability on acts that took place before SGSM terminated the Voucher Plan.

The district court found that Mr. Schwegmann and the other Schwegmann Defendants failed to fulfill many of

their fiduciary duties under ERISA including their disclosure and reporting obligations, ERISA's minimum funding requirements, and the requirement that the plans assets be held in trust. The Schwegmann Defendants do not challenge the correctness of this list of statutory breaches. As noted by the district court, it was not the decision to terminate the plan which denied the Plaintiffs their benefits but the longstanding failure to provide an independent source of funding which caused the Plaintiffs to lose their benefits when SGSM's business folded. If the plan had been properly funded, the Plaintiffs would not have been deprived of benefits upon the plan's termination. 29 U.S.C. § 1344.

Because fiduciary liability was predicated on statutory violations, such as failing to fund the plan, which took place prior to SGSM's decision to end the Voucher Plan, the district court did not err in finding that the Mr. Schwegmann and the other Schwegmann Defendants breached their fiduciary duty under ERISA. Thus, the district court correctly awarded judgment against the Schwegmann Defendants and in favor of the Plaintiffs in their capacity as representatives of the plan under Section 409 of ERISA. 29 U.S.C. § 1109.

VIII.

The Schwegmann Defendants summarily argue that none of the Plaintiffs are vested. While Defendants contested in the district court whether certain individual plaintiffs met the requirements for participation in the Voucher Plan, the Schwegmann Defendants failed to raise any general argument that no Plaintiffs had vested. Likewise, Plaintiffs contend that USF&G argues for the

first time on appeal that the only party which can bring this suit is the Pension Benefits Guaranty Corporation. USF&G has failed to direct us to any record citation in which it raised the issue below. "As a general rule, a party may not allude to an issue in the district court, abandon it at the crucial time when the district court might have been called to rule upon it, and then resurrect the issue on appeal." *Louque v. Allstate Ins. Co.,* 314 F.3d 776, 779 (5th Cir. 2002). Accordingly, we decline to consider these issues on appeal.

IX.

Finally, USF&G argues that, assuming the Voucher Plan is covered by ERISA, the self-insured retention (SIR) of $250,000 in its excess liability policy applies to each individual plaintiff's claim. Thus, USF&G contends that it is not responsible for any part of the judgment because each claim falls below the SIR.

The SIR provision contains only one line reading: "$250,000 each claim." Neither the SIR nor any other section of the policy defines the term "claim." The district court ruled that the failure to define this term rendered the policy ambiguous as a matter of law. Construing the policy against USF&G, the district court concluded that the term "claim" refers to a demand for coverage by the insured, SGSM, rather than the claims made against SGSM.

However, the absence of an express definition does not automatically render a policy term ambiguous. *Norfolk Shipbuilding & Drydock Corporation v. Seabulk Transmarine Partnership, Ltd.,* 274 F.3d 249, 254 (5th Cir. 2001). Under the basic tenets of contract interpretation, each of

the policy's provision must be read in light of the others. La. Civ. Code Art. 2050. Here, the meaning of "claim" for the purposes of the SIR provision can be gleaned by reference to the use of the word in numerous other provisions of the policy.

The policy includes three "coverage forms:" Excess General Liability Coverage, Excess Employee Benefits Coverage and Excess Liquor Coverage. Plaintiffs assert their claims under the Excess Employee Benefits Coverage form. The policy has a number of definitions and other provisions that apply to all coverages and provisions that apply only to Excess Employee Benefits Coverage. The provisions of the USF&G policy that apply both to all coverages and those that apply to the specific coverage at issue here consistently refer to claims made "against the insured" or claims "by the employee."[8] The term "claim" in

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[8] The following provisions apply to Excess Employee Benefits Coverage:

SECTION I COVERAGE

1. Insuring Agreement

b. This insurance applies to an "employee benefit incident" only if:

(3) A **claim** for damages because of the "employee benefit incident" is first made **against any insured**, in accordance with paragraph c. below, during the policy period or any Extended Reporting Period we provide under EXTENDED REPORTING PERIODS (Section IV).

c. **A claim by any "employee"** or the dependant or beneficiaries of any "employee" seeking damages will be deemed to have been made at the earlier of the following times:

(1) When notice of such claim is received and recorded by an insured or by us.

(Continued on following page)

the SIR provision, when read in light of these other provisions of the policy, is clear and unambiguous and provides that a "claim" is the assertion of a legal right against the insured by a third party.

> All claims for damages because of injury to the same "employee", including damages claimed by any beneficiary or dependent, arising out of the same "employee benefits incident" will be deemed to have been made at the time the first of these **claims is made against the insured**. (emphasis added).

SECTION III LIMITS OF INSURANCE

> 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of insureds, claims made, "suits" brought or "employees" or dependents or beneficiaries of **employees making claims or bringing "suits"**. (emphasis added).

The following provisions apply to all coverage provided by the policy:

G. DUTIES IN THE EVENT OF OCCURRENCE, ACCIDENT, CLAIM OR SUIT

> 3. You and any other involved insured must:
>
> e. Attempt to settle the claim or suit within the Self-Insured Retention Limit.

Q. SEPARATION OF INSUREDS

> Except with respect to the Limits of Insurance, "self-insured retention", and any rights or duties specifically assigned to the first Named Insured, this insurance applies:
>
> 1. As if each Named Insured were the only Named Insured; and
> 2. Separately to each **Insured against whom claim is made** or "suit" is brought. (emphasis added).

COMMON INVESTIGATION, DEFENSE AND SETTLEMENT PROVISIONS

> We will not be obligated to assume charge of the investigation, defense or settlement of **any claim or "suit" against the insured**, . . . (emphasis added).

One of the foremost authorities on insurance law states that "[g]enerally speaking, a 'claim' in a liability policy is considered to be an assertion by a third-party to the effect that the insured has caused the claimant damages through some acts or omissions and that the claimant intends to hold the insured responsible for all or a portion of the damages so caused." 20 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d,* § 130.2 (2002). Our conclusion that the term "claim" in the SIR provision means the assertion of a right by a third person against the insured is, thus, consistent with the generally understood meaning of this term.

Our conclusion is likewise consistent with that of other courts. For example, in *National State Bank, Elizabeth N.J. v. American Home Assurance, Co.,* 492 F. Supp. 393 (S.D. N.Y. 1980), the district court held that the undefined term "claim" referred to claims by third parties against the insured. In *National State Bank,* several lawsuits were filed against the insured, each of which sought recovery for the insured's negligent failure to report misstatements contained in financial records the insured was charged with auditing. The lawsuits were consolidated and later settled. Under the terms of the settlement, the insured assigned the plaintiffs its rights under a liability policy issued by American Home Insurance (American). After the underlying litigation was settled, the sole remaining issue was the extent of American's liability to the plaintiffs.

American contended that a "claim" in the Limits of Liability provision, means "a 'demand made by the insured for protection under the Policy.'" *Id.* at 395. The plaintiffs argued that a "claim" was the individual plaintiff's assertion against the insured. The court rejected American's

argument and adopted the plaintiffs' interpretation of the contract. Although the term "claim" was not defined in the American policy, the court found that the word was not ambiguous when read in the context of the policy as a whole. *Id.* at 396. The court noted that the provisions consistently applied to "claims against" the insured. *Id.* The court acknowledged that "claim" need not have the same meaning in each of the policy's sections; however, the court found that the policy was devoid of any language which would support American's argument. Thus, based on the language of the policy as a whole, the "clear contextual implication of these statements is that the word 'claim' refers to an assertion of a legal right by a third-party against the insured." *Id.*

We agree with the *National State Bank* court's analysis and conclude that "claim" in the SIR refers to a demand by a third party against the insured and not to a demand for coverage by the insured against its insurer.

We are also unable to accept the district court's conclusion that the action by the Plaintiff class should be considered a single claim. Most other courts define the term "claim" as an individual cause of action. See *Colbert County Hospital v. Bellefonte Insurance Co.*, 725 F.2d 651 (11th Cir. 1984); *Maxim Manufacturing Corporation v. Alliance General Insurance Co.*, 911 F. Supp. 239 (S.D. Miss. 1995). For example, in *Maxim Manufacturing Corporation v. Alliance General Insurance Co.*, the court considered whether the SIR in a policy was triggered once or twice by a lawsuit for the wrongful death of two children killed in a fire caused by a product distributed by the insured. Like the USF&G policy, the SIR applied to "each claim." Though the policy did not define "claim," the court found that the term unambiguously referred to an

individual cause of action. Because a separate action could have been brought on behalf of each of the decedents' estates, two claims were made, and accordingly, the SIR applied twice.

Similarly, in *Colbert County Hospital v. Bellefonte Insurance Co., supra,* the Eleventh Circuit considered whether a lawsuit filed by a former patient treated at the hospital asserted one claim under the terms of the Hospital's insurance policy or three. The patient was injured in three separate operations all performed at the Hospital by the same doctor on separate occasions. The insurer, Bellefonte Insurance Co., contended that the plaintiff had asserted a single claim because the term "claim" in the Limits of Liability provision meant a single lawsuit or a single lawsuit filed by a single plaintiff. The court disagreed and stated that the term "claim" and "suit" were used in the disjunctive in the provision, indicating that the terms had distinct meanings. *Id.* at 653. Thus, it rejected the insurer's interpretation of claim and held that because the plaintiff had three separate causes of action, the plaintiff had three separate claims against the insured. *Id.*

In support of their argument that this class action is a single "claim,"[9] Plaintiffs primarily rely on a notification

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[9] Plaintiffs cite *North American Biologicals Inc. v. Illinois Employers Ins. Of Wausau,* 931 F.2d 839 (11th Cir. 1991), in support of their argument that a class action is a single claim for the purposes of the SIR. We have carefully considered *North American Biologicals* but find it inapposite. The district court in *North American Biologicals* had denied the plaintiff's application for class certification. Thus, there was only one finite claim involved in the lawsuit.

We are also unpersuaded by the Plaintiffs' reliance on *Previews, Inc. v. California Union Insurance Company,* 640 F.2d 1026 (9th Cir.

(Continued on following page)

provision in the USF&G policy which requires the insured to notify USF&G of "each claim or suit" which presents an unusual exposure to coverage.[10] We disagree with the Plaintiffs that this phrase equates suit and claim. The plain meaning of this phrase – which uses the disjunctive – indicates that the two words have different meanings. This is particularly true in the context of the notification provision in which the words are used. We see no reason the insurer would want to limit the insured's obligation to give notice of either a suit or claim. The insurer needs and expects the insured to notify it of either a claim or a suit. Appellee's argument to the contrary is unpersuasive. *See Colbert County Hospital v. Bellefonte Insurance Co.*, 725 F.2d 651, 653.

Finally, the Plaintiffs argue that because no individual employee benefit claim arising out of Schwegmann's

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1981), in which an Erie bound Ninth Circuit followed a California appellate court's decision without independently analyzing the issue of whether a class action constitutes a single claim.

[10] The provisions on which the Plaintiffs rely read as follows:

> 2. The First Named Insured shown in the declarations will furnish us with the following:
>
> c. Written notification of each claim or "suit" which involves serious injury(ies) or damages. This notice must be provided as soon as possible, but no later than ten (10) business days from the date you have knowledge of such claim or "suit". Serious injuries or damages include, but are not limited to:
>
> (12) Any claim or "suit" not specified above that presents an unusual exposure to the coverage. Examples include: class actions, environmental exposure and bad faith allegations; or
>
> (13) Any other serious injury or damage which may involve our liability.

Voucher Plan could ever exceed the $250,000 SIR, the SIR cannot apply more than once to multiple claims arising out of the same occurrence because to do so would render the policy worthless. This argument overlooks at least two important considerations. First, Schwegmann selected the SIR to accomplish its insurance objectives. Schwegmann knew the details of its employee benefit plan and was able to weigh the level at which USF&G's coverage would be triggered against the premium it was willing to pay. Second and relatedly, the SIR applied to all of Schwegmann's coverages under the USF&G policy, including the general liability policy. Schwegmann certainly had potential exposure above the SIR under this coverage. So, we are satisfied that enforcing the SIR as written does no violence to the expectations of the parties.

In sum, we are satisfied that "claim" as used in the SIR is not ambiguous. It refers to an individual demand or cause of action asserted by a third party against the insured. Because each of the class members has a separate cause of action against the Schwegmann Defendants and could have filed an individual lawsuit against the Schwegmann Defendants for recovery of pension benefits, the SIR applies separately to each of their claims. None of the individual employee's claims exceed the $250,000 SIR, and we must therefore vacate the judgment against USF&G.[11]

[11] Because none of the individual claims brought by the Plaintiffs meet the SIR, we need not reach the issue of whether the policy coverage was triggered by a qualifying event.

X.

For the reasons stated above, we VACATE the judgment against USF&G. We affirm the judgment in all respects against the remaining Defendants and remand this case to the district court for entry of judgment consistent with this opinion.

AFFIRMED in part.

VACATED in part and

REMANDED.

IN THE UNITED SATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30246

JOHN MUSMECI; CARROL BOUDREAUX; WILLIE BLANCHARD; MELVIN CAMET, SR; JOSEPH DECUIR; MAURICE MIRANDA; JACQUELINE S PALAMA; VICTOR SCHAMBRA; BRUCE SOLOMONS; JOSEPH T SPITELERA; AUDREY TOAL, On their own behalf and on behalf of all similarly situated employees; YVONNE WHITE; CYNTHIA NORMAND; CHARLES CARROL DIONNE; JOSEPH O'NEIL DIONNE

Plaintiffs-Appellees

v.

SCHWEGMANN GIANT SUPER MARKETS INC; ET AL

Defendants

SCHWEGMANN GIANT SUPER MARKETS INC; SCHWEGMANN GIANT SUPER MARKETS PENSION PLAN; JOHN F SCHWEGMANN; G G SCHWEGMANN CO; JOHN SCHWEGMANN JR, Trust Estate; UNITED STATES FIDELITY & GUARANTY COMPANY

Defendants-Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

(Filed Aug. 15, 2003)

IN THE UNITED SATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30246

JOHN MUSMECI; CARROL BOUDREAUX; WILLIE BLANCHARD; MELVIN CAMET, SR; JOSEPH DECUIR; MAURICE MIRANDA; JACQUELINE S PALAMA; VICTOR SCHAMBRA; BRUCE SOLOMONS; JOSEPH T SPITELERA; AUDREY TOAL, On their own behalf and on behalf of all similarly situated employees; YVONNE WHITE; CYNTHIA NORMAND; CHARLES CARROL DIONNE; JOSEPH O'NEIL DIONNE

Plaintiffs-Appellees

v.

SCHWEGMANN GIANT SUPER MARKETS INC; ET AL

Defendants

SCHWEGMANN GIANT SUPER MARKETS INC; SCHWEGMANN GIANT SUPER MARKETS PENSION PLAN; JOHN F SCHWEGMANN; G G SCHWEGMANN CO; JOHN SCHWEGMANN JR, Trust Estate; UNITED STATES FIDELITY & GUARANTY COMPANY

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ON PETITION FOR REHEARING EN BANC

(Opinion 06/11/03, 5 Cir., _____, _____ F.3d _____)

(Filed Aug. 15, 2003)

Before KING, Chief Judge, DAVIS, Circuit Judge and LITTLE, District Judge*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc filed by appellants John Schwegmann, Jr., Trust Estate, G G Schwegmann Co, John F Schwegmann, Schwegmann Giant Markets Pension Plan, Schwegmann Super Markets, Inc and appellees John Musmeci; Carrol Boudreaux; Willie Blanchard; Melvin Camet, Sr; Joseph Decuir; Maurice Miranda; Jacqueline S Palama; Victor Schambra; Bruce Solomons; Joseph T Spitelera; Audrey Toal, On their own behalf and on behalf of all similarly situated employees; Yvonne White; Cynthia Normand; Charles Carrol Dionne; and Joseph O'Neil Dionne as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing [En] Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

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* [Illegible] of Louisiana, sitting by [illegible]

( ) Treating the Petition for Rehearing En Banc filed by appellants John Schwegmann, Jr., Trust Estate, G G Schwegmann Co, John F Schwegmann, Schwegmann Giant Markets Pension Plan, Schwegmann Super Markets, Inc and appellees John Musmeci; Carrol Boudreaux; Willie Blanchard; Melvin Camet, Sr; Joseph Decuir; Maurice Miranda; Jacqueline S Palama; Victor Schambra; Bruce Solomons; Joseph T Spitelera; Audrey Toal, On their own behalf and on behalf of all similarly situated employees; Yvonne White; Cynthia Normand; Charles Carrol Dionne; and Joseph O'Neil Dionne as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ W. Eugene Davis
United States Circuit Judge